IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EAW GROUP, INC.	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civ. Action No. 1:02CV02425(GK)(AK)
	)	
REPUBLIC OF THE GAMBIA,	)	
	)	
Defendant.	)	
	)	

STATEMENT OF INTEREST
OF THE UNITED STATES OF AMERICA

This Statement of Interest is filed by the Attorney General of the United States pursuant to 28 U.S.C. § 517. It is well settled that the United States enjoys the right to inform the court of its views in proceedings in which it has an interest. International Products Corp. v. Koons, 325 F.2d 403, 408 (2d Cir. 1963). Particularly in litigation affecting foreign relations, courts have given substantial deference to the views and concerns of the United States. In Re Minister Papandreou, 139 F.3d 247, 252 (D.C. Cir. 1998); Ex Parte Republic of Peru, 318 U.S. 578 (1943). Additionally, the Court has invited the United States to submit its views. Accordingly, the United States hereby sets forth its views on the foreign affairs implications of this litigation.

1. The United States understands that this action has been brought by the plaintiff to seek payment on a contract for lobbying services that has allegedly been entered into by the Republic of The Gambia ("The Gambia") and further that the defendant has lodged a counterclaim seeking

reimbursement for payments made on that contract. Currently pending before the court is defendant's motion to quash a notice for the deposition of His Excellency, President Yahya Jammeh, Head of State of the Gambia. President Jammeh is alleged to have first-hand knowledge about the parties' intent in negotiating the contract and has provided an affidavit in support of defendant's counterclaim. Plaintiff has not yet deposed any other Gambian officials.

In the view of the United States, head of state immunity is not implicated at this time. Of special relevance, President Jammeh is not a party to this litigation; nor is the exercise of compulsory jurisdiction over President Jammeh personally currently under consideration by the Court, (for example, President Jammeh has not been served with a subpoena for his testimony).[1] head of state immunity is not implicated at this time. Rather the party before the court is The Gambia and plaintiff seeks to have The Gambia produce President Jammeh.

2. In considering the impact of plaintiff's efforts to seek the deposition of President Jammeh, the Court should take into consideration the interests of the United States. Discovery in U.S. courts involving the head of state of a friendly foreign state is rare and implicates the foreign policy interests of the United States. Because such cases are also rare in other countries, U.S. practice may well influence how foreign courts handle this issue in the future. In particular, foreign courts confronted with a request

[1]Courts have recognized that when a court seeks to assert jurisdiction over a head of state, the principle of head of state immunity also applies to demands for the testimony of a foreign head of state. See In Re Grand Jury Proceedings, 817 F.2d 1108, 1110 (4th Cir. 1987); Estate of Domingo v. Republic of the Philippines, 808 F.2d 1349 (9th Cir. 1987) (court assumes that head of state immunity could extend to preclude deposition testimony by former President Marcos but finds no such request by new Philippine government or the United States) cf. Ye v. Zemin, 383 F.3d 620 (7th Cir. 2004) (head of state cannot be used as an involuntary agent for effecting service of process).

to compel discovery from the U.S. President could apply reciprocally the standards used by U.S. courts.

The United States is frequently a party to civil suits in foreign courts. If we were to confront a request to depose our President in such a case, we would hope the court would not even consider the request, if at all, unless there was a strong showing of necessity and materiality that was, at a minimum, at least as strong as a U.S. court would require before allowing personal discovery against such a high-ranking U.S. official. See United States v. Poindexter, 732 F. Supp. 142, 147 (D.D.C. 1990) (ordering deposition of former President Reagan upon a showing "that his testimony would be material as tested by a meticulous standard, as well as being necessary in the sense of being a more logical and more persuasive source of evidence than alternatives that might be suggested.") (footnotes omitted); Halperin v. Kissinger, 401 F. Supp. 272, 274 (D.D.C. 1975) (ordering deposition in civil case of former President Nixon upon a "strong demonstration of need without an undue invasion of presidential privacy").

Therefore, the United States believes that U.S. Courts should not consider the need for deposition testimony from a foreign head of state in the absence of a strong showing of a demonstrated need for testimony concerning material facts in the unique personal knowledge of that individual. Cf. Societe Nationale Industrielle Aerospatiale v. United States District Court, 482 U.S. 522, 546 (1987) (enjoining U.S. courts to "exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position" and to "demonstrate due respect . . . for any sovereign interest expressed by a foreign state.").

3. The caselaw regarding requests for testimony from senior officials in the Executive Branch is

instructive. Courts, including the D.C. Circuit, universally recognize the rule that, absent a showing of extraordinary circumstances or special need, the head of a federal agency may not be required to appear and testify at an oral deposition. Simplex Time Recorder Co. v. Secretary of Labor, 766 F.2d 575, 586-87 (D.C. Cir. 1985); see also In Re United States, 197 F.3d 310 (8th Cir. 2000); In Re Federal Deposit Insurance Corp., 58 F.3d 1055 (5th Cir. 1995); Kyle Eng'g Co. v. Kleppe, 600 F.2d 226, 231 (9th Cir. 1979); Sweeney v. Bond, 669 F.2d 542, 546 (8th Cir.), cert. denied, 459 U.S. 878 (1982); Shirley v. Chestnut, 603 F.2d 805, 807 (10th Cir. 1979); Peoples v. United States Dept. of Agriculture, 427 F.2d 561, 567 (D.C. Cir. 1970); Warren Bank v. Camp, 396 F.2d 52, 56 (6th Cir. 1968); Community Fed. Sav. & Loan Ass'n v. Federal Home Loan Bank Bd., 96 F.R.D. 619, 621 (D.D.C. 1983); Sykes v. Brown, 90 F.R.D. 77, 78 (E.D. Pa. 1981).

The principle is based on the pragmatic consideration that high government officials would be paralyzed from carrying out their duties if they were subject to being haled into court in every civil action against their agency:

> [P]ublic policy requires that the time and energies of public officials be conserved for the public's business to as great an extent as may be consistent with the ends of justice in particular cases. Considering the volume of litigation to which the government is a party, a failure to place reasonable limits on private litigants' access to responsible government officials as sources of routine pre-trial discovery would result in a severe disruption of the government's primary function.

Community Fed. Sav. & Loan Ass'n, 96 F.R.D. at 621; see also Sykes, 90 F.R.D. at 78; Capitol Vending Co. v. Baker, 36 F.R.D. 45, 46 (D.D.C. 1964).[2]

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[2] Time-consuming oral depositions of high-level agency officials impose the kind of "undue burden" within the ambit of Federal Rule of Procedure 26(c). See Capitol Vending, 36 F.R.D. at 46.

4. This Circuit has recognized that "[p]rinciples of comity dictate that we accord the same respect to foreign officials as we do to our own," since foreign ministers "are the equivalent of cabinet-level officials" in the United States. In Re Minister Papandreou,139 F.3d at 254. Cf. H.R. Rep. No. 94-1487 at 12, 23 (legislative history of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330; 1602-1611). In light of this unbroken precedent against routinely deposing high government officials, foreign and domestic, (much less heads of state), the court should not even consider the need to take discovery from President Jemmeh unless plaintiff can make a clear showing either that the discovery is "essential to prevent prejudice or injustice to the party who would require it," Wirtz v. Local 30, Int'l Union of Operating Eng'rs, 34 F.R.D. 13, 14 (S.D.N.Y. 1963), or that "extraordinary circumstances" exist, Community Fed. Sav. & Loan, 96 F.R.D. at 621. Certainly, plaintiff cannot make that showing now, before having deposed any other Gambian official.[3]

5. Even if, after the completion of other depositions, the Court determines that further information is needed from President Jammeh, the Court, in fashioning a discovery plan, should require plaintiff to use all available discovery tools to minimize any intrusion on the dignity of President Jammeh's office, and on the performance of his official duties. The Federal Rules of Civil Procedure offer plaintiff several alternative means to obtain the information short of the intrusive, and extraordinary step of deposing the head of state of a foreign government. In Re Papandreou, supra 139 F.3d at 254. Any party seeking the deposition testimony of a high level official under these circumstances must show that the information it seeks cannot be obtained through less burdensome means, such as through

[3]We understand that The Gambia does not object to the depositions of the other senior Gambian officials sought to be deposed by plaintiff.

interrogatories or requests for admissions. See Kyle Engineering, 600 F.2d at 231; United States v. Miracle Recreation Equipment Co., 118 F.R.D. 100, 105 (S.D. Iowa 1987); Sykes, 90 F.R.D. at 78; Wirtz, 34 F.R.D. at 14; Capitol Vending, 36 F.R.D. at 46.

6. The United States takes no position on whether the testimony of President Jammeh is, in fact, needed in these proceedings, and, if so, when, in what form, or on which issues. Nor does the United States take any position on what steps would be appropriate for the Court to take if it determines that additional information from President Jammeh was relevant and discoverable, but not forthcoming.

7. President Jammeh, as a head of state, would ordinarily have immunity from legal process in the United States. The Court, however, does not need to reach the issue of head of state immunity. As noted, the issue is not presented and plaintiff has not exhausted discovery alternatives that may be available. If the court concludes that discovery is needed from President Jammeh, it has available tools to address lack of cooperation through means other than asserting jurisdiction over him. If the issue of President Jammeh's personal immunity becomes ripe for consideration, the United States would like an

opportunity to submit its views on head of state immunity, which would be binding on the court. See Ye v. Zemin, 383 F.3d 620 (7th Cir. 2004).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November ___, 2004, I served the foregoing Statement of Interest of the United States by regular mail addressed to the following counsel for the parties:

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